

ImmQuest

“Qui bene interrogat bene docet” “He who questions well teaches well”

Editors-in-chief: Cecil L. Rotenberg Q.C. and Mario D. Bellissimo C.S.

Financial Analyses in the Test of Genuineness

Cobus Kriek

In terms of the *Immigration and Refugee Protection Regulations* (IRPR) 203 (1) (a) that became effective on 1 April 2011, Human Resources and Skills Development Canada/Service Canada (HRSDC/SC) **must** assess the genuineness of job offers in Labour Market Opinions (LMOs). The Canadian Border Services Agency/Citizenship and Immigration Canada (CBSA/CIC) must also conduct the same assessment of **genuineness** of job offers that is exempt from LMOs. During this assessment the following four factors must be assessed as explained in Immigration and Refugee Protection Regulation 200(5):

- (a) whether the offer is made by an employer, other than an employer of a live-in caregiver, that is actively engaged in the business in respect of which the offer is made;
- (b) whether the offer is consistent with the reasonable employment needs of the employer;
- (c) whether **the terms of the offer are terms that the employer is reasonably able to fulfil**; and [emphasis added]
- (d) the past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work.

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Financial Analyses in the Test of Genuineness

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To predict the behaviour of HRSDC/SC and CIC/CBSA officers with regard to IRPR 200 (5) (c) or the “reasonably able to fulfill” requirement (which could be called the “affordability” factor), lessons can be learned from the test of *genuineness* that is currently being applied during the formulation of Arranged Employment Opinions (AEOs). This test of genuineness had already been in existence for many years and could hold very valuable clues to the future (in the post 1 April 2011 era).

Regulations and Rules of Service Canada about Genuineness

HRSDC/SC published its own rules to implement the above mentioned compulsory test of genuineness as mentioned in IRPR 200 (5). According to these online rules the following information could be required in the assessment of these 4 factors:

- Canada Revenue Agency (CRA) documents including T4 Summary of Remuneration Paid, Schedules 100 and 125 of the T2 Corporation Income Tax Return, T2125 Statement of Business or Professional Activities;
- Business contracts for goods and/or services;
- Provincial workers compensation clearance letter or other appropriate provincial documentation; and
- Attestation by a lawyer, notary public or chartered accountant confirming that the employer exists and the type of business the employer operates.

It is important to note that there is not a specific list of documents that are required for the assessment for each factor, but rather a list of documents that could be used to assess all four factors or any specific factor.

As explained above, for many years before the new rules of genuineness came into effect, HRSDC/SC had to assess the genuineness of an arranged employment offer before an Arranged Employment Opinion (AEO) was issued pursuant to IRPR 82

(2). When Service Canada (specialized unit in New Brunswick) evaluates the genuineness of a job offer for an AEO, the officers are guided by rules (some of which are unwritten and some that are not published for the employers and immigration representative to read and understand). Over time it has been determined that Service Canada officers make an assessment about the genuineness of these arranged job offers by obtaining the following information (*inter alia*):

- How the employer is dealing with the labour shortage until the foreign national will arrive 18 months from the decision;
- What role the foreign national will fulfill and how this will assist the employer to be more effective, profitable or competitive;
- Service Canada officers also started to request T2 Tax Returns although this was not listed as one of the required documents to be provided in a request for an AEO.

Service Canada's Interpretation and Tactics

Prior to the publication of the above-mentioned four factors pertaining to genuineness on 1 April 2011, Service Canada in New Brunswick requested the T2 Tax Returns from the most recent financial year to make a determination of the “genuineness” of job offers in AEOs. Essentially, officers evaluated the “affordability” of the employment of the foreign national as a factor of genuineness, although no rules exist for this affordability test in AEO requests.

There are no statistics available on how many AEOs are refused and for what reason. The trend within Service Canada is only to provide a conclusion and not the reason for refusals. Therefore, to obtain statistics about actual trends in reasoning within decisions will be impossible as Service Canada cannot obtain statistics as the reasons are not captured in decisions. “Reasons” are hidden in vague statements such as: “Service Canada is not able to determine the genuineness of the job offer”, which is just a conclusion. Therefore, only a handful of cases are available to make deductions from. With the available information about refusals, the following deductions are made: The logic behind the use of the information contained in T2 Tax Return during an AEO decision-making process is to determine whether the foreign national can be paid a salary. ***During the analyses of the T2 Tax Return for an AEO, Service Canada determines whether there are sufficient retained earnings or profit from the previous financial***

year before providing a positive AEO. This is very important and possibly an indication of a future trend that is expected to also be implemented by SC/HRSDC in LMO's and also CIC/CBSA in making a decision about the genuineness of job offers in work permits (that is LMO exempt).

In an AEO refusal (which was later reversed) in November 2010, an officer stated: **“Service Canada is not able to determine the genuineness of the job offer”**, but added: **“The information provided has not yet demonstrated the business ability to sustain the additional payroll cost to be incurred with the hiring of the foreign national.”** It should be added that the employer has been paying the foreign national a salary for two years in the low-skilled project, the employer has been in existence for 20 years, the employer has roughly 350 workers and has not missed a single wage payment to an employee in 20 years. The moment the T2 Tax Return was supplied by the employer, the representative called the employer as a de-brief and determined whether the Service Canada officer called the employer and what was discussed. The employer explained that the Service Canada officer mentioned that the T2 **does not have enough retained earnings**. It became obvious that a holistic approach to affordability of the employer to pay the wage is not part of the instructions given to Service Canada officers. It seems as if there is a short checklist with one block that reads: “Retaining earnings from T2 Tax Returns must be more than the annual wage of the foreign national.” The employer and immigration representative jointly decided that a refusal was to be expected. In the absence of Service Canada giving a formal opportunity to respond to the concerns of the officer (fairness letter) or contacting the representative for comments, an extension of 2 weeks was immediately requested by the representative. The employer’s Chartered Accountant (CA) was requested to provide an expert opinion within this two-week period. The CA explained (*inter alia*) that the employer paid out the CAD 250,000 profit of the previous year as bonuses to its shareholders and that the employer has just been approved to obtain a CAD 5 million loan for capital expansions. Would the employer be able to afford a wage of CAD 55,000? Any rational person that is not looking at a checklist would indicate that the employer can afford the wage of CAD 55,000. The CA also explained the danger of relying on T2 Tax Returns as it includes depreciation that is not an actual cash expense but an allowable deduction to decrease taxable income. In a bizarre sequence of events, the officer refused the AEO and

gave the employer 30 days to submit new facts. The employer’s CA then resubmitted the same facts and the AEO was approved. In this case it is clear that there is not a good understanding within Service Canada of the complexity of financial analyses. There seemed to be an indication of a “checklist” approach without a thorough understanding of the critical issues of financial analyses and how businesses operate in a modern capitalist society.

Recently a flight school in Alberta requested an AEO for a flight instructor (and a qualified pilot). The SC officer requested T2 Tax Returns and, apparently in the absence of sufficient retained earnings (the officer’s interpretation as verbally mentioned to the president of the company), a refusal was made in the AEO request. During the decision in which the refusal was communicated, the following reason was provided: “Service Canada is not able to determine the genuineness of the job offer. The information provided has not demonstrated the business’s ability to sustain the additional payroll cost to incur with the hiring of the foreign worker.” Subsequently, a request for leave to appeal an AEO refusal by SC was submitted (**Jayme Hepfner and Springbank Air Training College and Minister of HRSDC; Federal court Docket IMM1545-11**). On 25 May 2011, a discontinuance was filed and the matter was settled after the Department of Justice suggested a reconsideration. Before the approval was issued, council of HRSDC (not the officer) in Ottawa asked several questions about the genuineness of the job offer, and not a single question had any relevance to retained earnings. It seemed as if the initial refusal, where retained earnings played a role, was not based on sufficient facts and was completely ignored in the reconsideration. It, therefore, seems as if the narrow focus on retained earnings (as obtained from the T2 Tax Return) to determine the genuineness of job offers cannot withstand any scrutiny.

It is very important that representatives understand and are prepared for some Service Canada officers to call the employer directly and to refuse an application for reasons associated with genuineness before the representative can provide any comments. In a recent case, a representative was participating in a conference call with the employer and a Service Canada officer. Towards the end of the call, the Service Canada officer insisted the representative leave the call as the “other matters” the officer did not want to discuss “didn’t concern” the representative. Afterwards, the representative found out the officer wanted to discuss a problem with the requirements listed in the advertisement and up to this day

the representative does not know why this issue was of no concern to the representative. The anti-representation attitude is a well-established trend throughout some offices of Service Canada. It is assumed that this is supported by some in management or that some in management are completely oblivious to its existence, or maybe both. Management of HRSDC/SC might be unaware of jurisprudence on the issue of representation before administrative tribunals. When Service Canada is making a decision in an AEO request, representatives will not be made aware of an imminent negative determination and will probably not be given an opportunity to respond to any concerns of the Service Canada officer. ***Therefore, be prepared for the same process and sequence of events during the LMO decision-making process, especially after the submission of additional information such as T2 Tax Returns.***

Essentially, Service Canada officers are trying to determine or predict the future of the ***net working capital***. Net working capital is the difference between current assets (which is cash inflows in one year or less, such as accounts receivable) and current liabilities (which must be paid in one year or less and includes salary, rent, etc.). If the current assets are more than current liabilities, the employer would have a positive working capital. Service Canada is using past financial performance in the tax return to make a future prediction of whether there be positive net working capital when the foreign national will arrive.

A request was submitted to a Service Canada officer to provide a copy of the Service Canada policy in which the ability to pay the wage by the employer based on the T2 Tax Return is explained. However, the request remains unanswered. It is reasonable to assume that there is no formal policy about the interpretation of the T2 Tax Returns. It is reasonable to assume that there is no formal policy about the interpretation of the T2 Tax Returns. Officers are guided by unwritten rules and “an agreement” amongst Service Canada staff that the T2 Tax Return must contain retained earnings before a positive AEO may be issued.

It seems as if Service Canada’s obsession with retained earnings in the T2 Tax Return becomes so strong that other relevant factors are being ignored. Explained in different words: The fixation on the net working capital as obtained from the most recent tax return to determine the future ability to meet future obligations is completely wrong. It is flawed for 14 reasons:

1. Taking the information about the retained profits from the T2 Tax Return does not make sense as the tax return includes tax-deductible depreciation before profit is determined. The profit shown in a tax return is, therefore, less profit shown in the income statement as the profit is legally decreased due to the allowance of depreciation (i.e. claim of Cost Capital Allowance as a deductible from income to determine taxable income). The main purpose for devaluating assets is to create a reduction in the tax liability by reducing net income. Devaluation is not a true cash expense, but Service Canada does not understand this.
2. A “liquid” firm is one that easily meets its short-term obligations as they come due. Salary is just one of these obligations. Liquidity refers to the solvency of the firm’s overall financial position, and the three measures of liquidity are: Net working capital, current ratio and the acid test ratio. Net working capital is the firm’s ability to meet its short-term obligations, such as salary. The current ratio is the current assets divided by current liabilities. A current ratio of two is commonly being referred to as being acceptable. The acid test is the same as the current ratio except that it excludes inventory as some types of inventory can only be sold with credit or cannot be sold easily, such as partially completed products. Essentially, Service Canada’s objective is to obtain retained profits from a T2 Tax Return and to project a future liquidity of the employer (as measured by net working capital, current ratio or the acid test). When the liquidity of the firm (as described through one of the definitions) is used as one of many factors, the information should be extracted from its financial statements and not the T2 Tax Return.
3. The rules of Service Canada also do not request any information about the ability to finance short-term liabilities through techniques such as bank loans/lines of credit. If a company has a good credit rating and assets worth several million dollars with a positive cash flow, would a bank finance an annual salary of CAD 55,000? I believe it would. However, it seems as if some HRSDC/SC officers believe the only source of finance is cash from retained profits. We are being sent back through a time warp to a time before 1760 BC when the Babylonian ruler Hammurabi developed the first banking system and the associated banking laws. I wonder if the brainchild of this approach at HRSDC/SC has a bank loan to buy a house, or to

buy a car, or pay for a vacation with a credit card, or even had a study loan (all based on credit worthiness)?

4. This conservative approach of Service Canada does not take into consideration the balance sheet and size of the employer's assets. Assets can be used as security to finance future liabilities such as salary.
5. It does not assess the history of liquidity over a long period, only the tax returns from the previous financial year (especially if it was a 2009 tax return that would have figures from the only recession in 20 years).
6. Income tax losses can be carried forward for 20 years. Businesses that are capital intensive might only show retained profits in the T2 Tax return after several years. It does not seem as if Service Canada policies take this into account. There are many capital-intensive industries (listed on the TSX) that will not have retained earnings for many years. However, these types of companies will be able to pay salaries for many years to come, will experience an increase in personnel and an increase in financial turnover.
7. It does not take into consideration the employer's history to pay its creditors and vendors. Neither do the rules require officers or even remind officers to obtain an opinion from financial intermediaries such as creditors.
8. It does not take into consideration the sales forecast. Sales forecasts will lead to a pro-forma income statement and pro-forma balance sheet.
9. The existing conservative approach of Service Canada does not include the analyses of payroll over many years. An analysis of the payroll trend of an employer might show a constant increase in payroll expenses. If this is the case, it should also be considered as a positive factor in the "affordability factor" analysis.
10. It does not take into consideration how many full-time employees were being paid without lay-offs in the preceding years.
11. The employment of a foreign national should result in increased income as that is the actual reason for the appointment of the foreign national in the first place; to make more profit. The future income that can be created by the

appointment of a foreign national is not considered by Service Canada and not addressed in the latest rules.

12. It does not take into account the factors that could result in a zero or negative retained earnings (as shown) in the T2 Tax Return. For example, Directors of an Incorporated company might have received the remaining profits as dividends or bonuses. Nothing would prevent the directors from placing the funds back into the corporation to fund a current liability such as salary.
13. It does not take into account the number of years an employer has been in existence, which is one of the best measures of success.
14. Incorporated employers can have zero profits, for years of profits are paid out as bonuses or dividends. The belief that an incorporated owner must show retained profits is a fallacy and is probably a symptom of a lack of understanding about how businesses operate in the modern world.

There is a possibility that this conservative approach of Service Canada (with its own limitations as explained above), that was observed in AEOs, could filter through to the new test of genuineness of job offers in LMOs by HRSDC/SC and job offers that are LMO exempt by CBSA/CIC. This concern is supported by the lack of guidance in the latest online rules by HRSDC/SC to assess the genuineness of job offers.

Regulations and Rules of CBSA/CIC and Comments

The CBSA/CIC *must* also assess the genuineness of jobs in work permits that are LMO exempt pursuant to IRPR 200 (1) (c) (ii.1) (A), which also came into effect on 1 April 2011. This assessment is based on the same four factors mentioned in IRPR 200(5), above. The CIC/CBSA was significantly clearer when it interpreted the new regulations in its rules, as published in Operational Bulletin 2075-C dated 1 April 2011. Although the focus of this article is on IRRP 205 (c) [or the affordability factor as part of the test of genuineness], all four factors are briefly discussed.

For IRPR 205(a) ("actively engaged" requirement), the following information *can be requested* by the CBSA/CIC:

- Job offer
- Provincial/municipal business license

- Business registration or legal incorporation
- HR Plan
- Commercial rental/lease agreement; deed of property in case of new ownership
- Company Organization Chart
- PD7A (Statement of Account for Current Source Deductions)
- T 4 Remittance Summary
- T 2125 (Statement of Business Activities)
- T 2032 (Statement of Professional Activities)
- T2 – 100 Balance sheet information
- T2 – 125 – Income Statement Information

For IRPR 205 (b) (“reasonable needs” requirement) the following information **can be requested** by the CBSA/CIC:

- Job Offer on letterhead of the employer
- HR Plan
- Company Organization Chart
- Service Contract with other companies
- New contracts of new business
- Advertisements in media, rental of booths at shows, (i.e. a previous mining convention)

For IRPR 205 (c) (“reasonably able to fulfill requirement” or the “affordability” factor), the following information **can be requested** by the CBSA/CIC:

- PD7A’s
- T4 Remittances
- HR plan
- T2125 (Statement of Business Activities)
- T2032 (Statement of Professional Activities)
- T2 – 100 Balance sheet information
- T2 – 125 – Income Statement Information (T2 Schedule 100/125 provides insight into the solvency of a business by

providing information on operating income and the overall financial position/retained earnings of the business)

- Business registration or legal incorporation
- Letter from CA, CGA or CMA stating that the company has the financial capacity

For IRPR 205(d) (“past compliance”), the following information **can be requested** by the CBSA/CIC:

- Compliance with record-keeping rules according to the provincial labour laws of
- different provinces;
- Registration with and payment of premiums to Workplace Insurance and Safety
- Boards (WISB) of different provinces;
- Payment of Employment Insurance premiums;
- Registration of third-party recruiters according to provincial statutes.

CBSA/CIC’s Interpretation

Although the Operational Bulletin 275-C is an improvement on Service Canada’s online rules, the same lack of understanding about financial fundamentals of businesses is becoming evident in this Operational Bulletin as reference is made to T2 Schedule 100/125 as it “provides insight into the solvency of a business by providing information on the operating income and the overall financial position/retained earnings of the business.”

In the above-mentioned Operational Memorandum, no guidance was provided about the fourteen pitfalls of using a T2 Tax Return to finance a current liability (such as salary) as explained above. It only provides officers to “obtain insight” from the T2 Tax Return. Expect that CBSA/CIC officers that are untrained in financial analyses that must make decisions in a policy vacuum in the same conservative way as HRSDC/SC in the EAO process in the coming months when the genuineness of job offers are being assessed (in the LMO process or during transfers of LMO-exempt job offers). Therefore, expect CBSA/CIC to use this T2 Tax Return in isolation to determine the employer’s ability to pay the salary (as explained above).

What will be done with the information in the PD7As and the T4s is unsure at this stage. The PD7As will only show that taxes were paid on behalf of employees and nothing more. The interpretation of the facts contained within the T4 is also unsure. No guidance is provided to CBSA/CIC officers to assess the facts in the PD7As and T4s to determine the ability of the employer to finance a current liability such as salary.

Advice to Immigration Representatives

If T2 Tax Returns are requested after a LMO request, expect SC/HRSDC and CIC/CBSA to act in the manner Service Canada officers reacted in AEO's. To prevent a refusal based on insufficient retained earnings, take the following steps:

- Explain to the Canadian employers the new rules about genuineness (four factors) and the effect it could have on the cost, length of processing of the decisions, and the outcome of an AEO, LMO or a work permit request (that is LMO-exempt).
 - Ensure that an expert opinion is included into the cost calculations for the law work to be completed.
 - Service Canada ignores third parties constantly and, therefore, Immigration representatives might not be aware of an imminent refusal by Service Canada. Service Canada officers interview employers directly by telephone and will make decisions without consulting Immigration representatives. Ensure that employers are reminded to inform the immigration representative when Service Canada communicates with the employer; this should include what was communicated and what was the officer's verbal response to information provided, with specific reference to T2 Tax Returns. Attempt to predict problems and take the appropriate action.
 - Study the retained profits in the T2 Tax Returns (Schedule 100 and 125) as well as T2125, (which is a combination of T2032 and T2024 and used by sole proprietorships, partnerships or joint ventures) **before submissions** are made for LMOs, AEOs and work permits (that are LMO-exempt). If the retained earnings are not sufficient to pay the wage, be prepared to obtain an expert opinion about liquidity by a financial expert such as a CA, CMA or CGA. The financial expert will refer to concepts such as net work capital, financial history of the employer, sales forecasts, debt ratio, history of paying creditors, trends in payroll and other financial indicators in financial statements. Ensure that the financial expert also explains concepts such as net working capital, solvency and cost of capital allowance, etc. The opinion should be easy to understand and all basic concepts must be explained in clear laymen's terms. Do not expect all readers of the expert opinion to understand terms such as cost of capital allowance, accounting factorization, liquidity and solvency.
- Educate officers in the submission about the dangers in only using retained earnings and the retaining earnings as retained in the T2 Tax Return to make a final determination.
 - Provide letters from the major creditors in which it is indicated that the employer has the ability to pay the wage of the foreign national.
 - Provide additional information to support the ability to pay the wage, although it has not been requested. This could include signed contracts about the provision of future income (accounts receivable or current assets), a letter of support from the bank or other creditor, etc.
 - Explain how the foreign national's appointment will lead to increased income and profit for the employer.
 - Explain how long it will take from the date that the foreign national starts work until that foreign national will contribute to income, essentially paying his or her own salary through increased income generated.
 - Ensure that the HR plan refers to financing of the salary of the foreign national.
 - If the payroll has steadily increased, provide evidence of that increase over time.
 - If there had been no terminations of employment, provide information about the continued employment of its workforce in recent years.
 - Always request detailed reasons for the decisions with specific reference to the T2 Tax Return. The absence of reasons in a negative decision could provide sufficient grounds for requesting leave to appeal a negative decision in Federal Court.

Conclusion

Prior to 1 April 2011, Service Canada started to use information about retained earnings from T2 Tax Returns to refuse AEOs. In the rules that were published by SC/HRSDC and CIC/CBSA after Immigration and Refugee Protection Regulation 200 (5) came into effect, specific reference was made to T2 Tax Returns. It is expected that the same narrow interpretation could be implemented in the test of genuineness which is now a statutory obligation for all job offers that is used in LMO requests as well as job offers for work permits that are LMO exempt. This narrow focus on retained earnings to determine the genuineness of the job offer is flawed for 14 reasons and probably cannot withstand any scrutiny. In order to prevent a refusal based on insufficient retaining earnings, well-argued submissions would be required with specific reference to methods of financing current liabilities such as future wages.

Cobus (Jacobus) Kriek is a Certified Canadian Immigration Consultant. His immigration law practice focuses on labour market opinions, arranged employment opinions, work permits and permanent residence for skilled workers, provincial nominees and entrepreneurs. He can be reached at (780) 409-0931 or at cobus@matrixvisa.com.

Case Tracker: Cases You Should Know!

Mario D. Bellissimo, C.S.

Citizenship (Residency Test)

Case: *Dedaj v. Canada (Minister of Citizenship & Immigration)*

Decider: James W. O'Reilly J.

Court: Federal Court

Citation: 2010 FC 777

Judgement: July 26, 2010

Docket: T-2044-09

[7] Some years ago, this Court recognized that there was more than one valid approach to determining whether an applicant had met the residency requirement of the Act. The two principal approaches involve, on the one hand, a purely physical test and, on the other, a qualitative test of residency: *Canada (Minister of Citizenship and Immigration) v. Nandre*, 2003 FCT 650 (CanLII),

2003 FCT 650, at para. 11. In *Nandre*, I concluded, citing six main reasons, that where a citizenship judge finds that an applicant had not satisfied the physical test, he or she has an obligation to go on to apply the qualitative test. The latter involves an inquiry, based on a consideration of several factors, into whether the applicant had established and maintained a residence in Canada for the required period. The relevant factors appeared in *Koo (Re)*, 1992 CanLII 2417 (F.C.), [1993] 1 F.C. 286 (T.D.).

[9] In my view, the citizenship judge had an obligation to consider the qualitative test. While she did consider Mr. Dedaj's ties to the United States and commented on his having centralized his life there, she relied mainly on developments that post-dated his citizenship application. Further, she did not appear to consider the evidence supporting Mr. Dedaj's ties to Canada. Nor did she analyze the relevant factors from *Koo*, above.

Family Class – Parents (PR Fees)

Case: *Li v. Canada (Minister of Citizenship & Immigration)*

Decider: Richard G. Mosley J.

Court: Federal Court

Citation: 2010 FC 803

Judgment: August 5, 2010

Docket: IMM-804-09

[59] Charging fees in advance of providing a service is an ordinary and uncontroversial practice and does not render a fee imposed by a regulation *ultra vires* FAA s. 19 (2) so long as there is a clear nexus between the fee and recovery of the costs incurred by the government for services provided or to be provided. Nor is the regulation in conflict with the enabling authority when, in some instances, the service for which the fee is paid cannot be performed because of the failure of an intervening act or event.

[60] In this instance, the government has made a policy choice to require payment of a fee in advance recognizing that in a small proportion of cases the service will not be provided and the fee must be refunded. I am not persuaded that this renders the regulation *ultra vires*, particularly in light of the evidence that only a small percentage of sponsorship applications are rejected. The vast majority are granted and proceed to the PR application. The fee is fully refundable in those cases where the sponsorship applicant is found to be ineligible and has elected not to proceed with the permanent resident application notwithstanding that result. In my view, that brings the regulation within FAA s.19

(2). For these reasons, I find that s.295 (3) (a) is *intra vires* its enabling authority insofar as there is a clear nexus between the fee and the costs incurred in providing the service.

CERTIFIED QUESTION:

[61] The parties have jointly submitted the following question for certification:

Is *Immigration and Refugee Protection Regulation* 295 (3) (a), as applied to sponsored immigrant visa applications made by parents and grandparents, *ultra vires* on the ground it is inconsistent with s.19 of the Financial Administration Act?

Investor (China)

Case: *Pan v. Canada (Minister of Citizenship & Immigration)*

Decider: Paul S. Crampton J.

Court: Federal Court

Citation: 2010 FC 838

Judgement: August 24, 2010

Docket: IMM-5339-09

[49] Finally, given the discrepancies in the information that Ms. Pan provided with respect to her financial affairs, I am satisfied that it was reasonably open to the Visa Officer to conclude that Ms. Pan had not satisfied him that she had a legally obtained minimum net worth of at least \$800,000. Ms. Pan was provided numerous opportunities to address the Visa Officer's concerns regarding this issue. Unfortunately, she failed to avail herself of those opportunities. In my view, after considering all of the information provided by Ms. Pan, it was entirely reasonable for the Visa Officer to have been left with doubts regarding whether Ms. Pan met this requirement of paragraph 88(1)(b) of the *Regulations* and the requirements of section 90.

FCA (Transcripts)

Case: *Hillary v. Canada (Minister of Citizenship & Immigration)*

Decider: J. Edgar Sexton J.A.

Court: Federal Court

Citation: 2010 FCA 215

Judgement: August 24, 2010

Docket: A-247-10

[2] The respondent seeks to include the transcript of the proceedings before the Immigration Appeal Division in the appeal book. In my view it should not be included. The transcript was

not put before the Motions Judge, nor is there any evidence that an effort was made to do so. The respondent argues that the question as certified raises a broader issue. However, this Court has held that a question should not be certified unless it arose in the Court below. (*Zazai v. Canada (Minister of Citizenship and Immigration)* 2004 FCA 89 (CanLII), 2004 FCA 89 at paragraph 12). Thus, the issues to be addressed are those raised in the Court below. At that time it was apparently not thought to be necessary to include the transcript to deal with those issues. It would therefore not be necessary to have the transcript in the Court of Appeal.

[3] Furthermore, when a party makes a tactical decision not to introduce a piece of evidence in the Court below, the party will not have the opportunity to introduce that evidence on appeal.

Imperial Oil Ltd. v. Lubrizol Corp. (1995), 191 N.R. 244 (C.A.) at paragraph 5.

United Scottish Cultural Society v. Canada (Custom & Revenue Agency) 2004 FCA 324 (CanLII), 2004 FCA 324 at paragraph 5.

[4] Lastly, no affidavit was filed in support of the motion to introduce the transcript on appeal nor is there sufficient specificity as to what the respondent seeks to establish by inclusion of the transcript. Bare assertions are not sufficient to introduce fresh evidence on appeal.

Pfizer Ltd. v. Ratiopharm Inc. 2009 FCA 228 (CanLII), 2009 FCA 228 at paragraphs 6 and 7.

Detention Review

Case: *Canada (Minister of Public Safety & Emergency Preparedness) v. Steer*

Decider: Sean Harrington J.

Court: Federal Court

Citation: 2010 FC 830

Judgement: August 19, 2010

Docket: IMM-4731-10

[19] I need not to come to any decision on this issue, as I am not satisfied that the Minister will suffer irreparable harm. There is absolutely nothing to suggest that the Member got it wrong in his assessment of the danger to the Canadian public. The risk of harm is that Mr. Steer might flee and sums would be expended

to hunt him down, a hunt which might prove to be unsuccessful. The Immigration Division, which has expertise in these matters, was of the view that Mr. Steer's risk of flight is counterbalanced by conditions imposed, including weekly reporting and the requirement that he fully cooperate with the CBSA in arranging his travel documents. The Minister has not made out a case that he will suffer irreparable harm should Mr. Steer be released. He is on a short leash.

[20] Finally, it might be said that the balance of convenience favours the Minister, notwithstanding that Mr. Steer could not continue his employment while incarcerated. The Minister would prefer the certainty of taxpayers paying for Mr. Steer's detention rather than face the possibility that more money might have to be expended to search him out should he flee. Of course, if the Member got it right he will not flee and no additional public funds will be expended.

Criminal – Challenge Criminal Sentence – Adjudgment

Case: *R. v. Bahadur*

Decider: Caldwell J.A.

Court: Saskatchewan Court of Appeal

Citation: 2010 SKCA 103

Judgement: August 31, 2010

Docket: 1874

[13] Applying the factors set out in *Morin*, I conclude that, while the applicant did not have a *bona fide* intention to appeal before the time for appeal expired, he has satisfactorily explained why he did not exercise his right of appeal within the prescribed time. The Crown will incur the cost and drain on resources associated with an appeal, and this is of concern; however, I see no undue prejudice to the Crown in extending the time for appeal. Furthermore, the applicant's proposed appeal raises the reasonably arguable issue that the applicant's sentence gives rise to potentially-severe, collateral consequences that were unforeseen and unintended at the time of sentencing (see: *R. v. Almajidi*, 2008 SKCA 56 (CanLII), 2008 SKCA 56, 310 Sask. R. 142; *R v. Truong*, 2007 ABCA 127 (CanLII), 2007 ABCA 127, 404 A.R. 277; *R. v. Moretto*, 2009 BCCA 139 (CanLII), 2009 BCCA 139; *R. v. Sutherland*, 2008 BCCA 158 (CanLII), 2008 BCCA 158; *R. v. Leila*, 2008 BCCA 8 (CanLII), 2008 BCCA 8, 250 B.C.A.C. 117; and *R v. C.(B.R.)*, 2010 ONCA 561 (CanLII), 2010 ONCA 561).

[14] Accordingly, after balancing the factors set forth in *Morin*, I find that the applicant has demonstrated the existence of special circumstances such that the interests of justice weigh in favour of extending the time for appeal. The applicant shall have one calendar month, calculated from the date of these written reasons, within which to file an appeal or notice of an application for leave to appeal his sentence.

Section 34(1) – Certified Question

Case: *Peer v. Canada (Minister of Citizenship & Immigration)*

Decider: Russel W. Zinn J.

Court: Federal Court

Citation: 2010 FC 752

Judgement: July 19, 2010

Docket: IMM-5147-09

Certified Question

[43] The applicant proposes the following question for certification:

Is a person inadmissible to Canada for having engaged in “espionage against a democratic government or institutions” [*sic*] pursuant to section 34(1) of the Immigration and Refugee Protection Act if the person engaged in intelligence gathering activities that are legal in the country where they take place, do not violate international law and there is no evidence of hostile intent against the persons who are being observed?

Visitor (Sri Lanka)

Case: *Paramasivam v. Canada (Minister of Citizenship & Immigration)*

Decider: James Russell J.

Court: Federal Court

Citation: 2010 FC 811

Judgement: August 9, 2010

Docket: IMM-6034-09

[47] First, the Officer erred in his balancing of the factors which might prompt the Applicant to stay as opposed to those factors which suggest she would return to Sri Lanka. In order to properly balance the Applicant's family ties in Sri Lanka, the Officer ought to have considered the presence of all of the Applicant's family in Sri Lanka including her mother. In fact, the Officer

shows no awareness of the Applicant's ties to Sri Lanka when he describes them as "very few." This suggests to me that they were either left out of account or unreasonably assessed. Either way, this renders the Decision unreasonable.

[48] The Officer further erred by implying that the Applicant had falsified her state of employment. Indeed, the Officer had information to support the Applicant's claim. He erred by failing to properly consider this evidence in determining the truthfulness of the Applicant's claim of employment. As noted by the Applicant, it is unreasonable to infer that a 69-year-old widow could not be employed. This is especially so where there are documents before the Officer that support a contrary conclusion.

[49] The Officer has also overlooked highly material evidence provided by the Applicant's brother who is employed by the Federal Government of Canada as described in his letter.

Interim Federal Health Benefits

Case: *Toussaint v. Canada (Attorney General)*

Decider: Russel W. Zinn J.

Court: Federal Court

Citation: 2010 FC 810

Judgement: August 6, 2010

Docket: T-1301-09

[91] Delay in medical treatment and severe psychological stress caused by government action have both been recognized as implicating the life, liberty and security of the person protections in s. 7 of the *Charter*. *Chaoulli, supra*; *R. v. Morgentaler*, 1988 CanLII 90 (S.C.C.), [1988] 1 S.C.R. 30; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (S.C.C.), [1999] 3 S.C.R. 46. The evidence before the Court establishes both that the applicant has experienced extreme delay in receiving medical treatment and that she has suffered severe psychological stress resulting from the uncertainty surrounding whether she will receive the medical treatment she needs. More importantly, the record before the Court establishes that the applicant's exclusion from IFHP coverage has exposed her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences. The medical evidence before the Court establishes that

[i]f she were to not receive timely and appropriate health care and medications in the future, she would be at very high risk

of immediate death (due to recurrent blood clots and pulmonary embolism), severe medium-term complications (such as kidney failure and subsequent requirement for dialysis), and other long-term complications of poorly-controlled diabetes and hypertension (such as blindness, foot ulcers, leg amputation, heart attack, and stroke).

In my view, the applicant has established a deprivation of her right to life, liberty and security of the person that was caused by her exclusion from the IFHP.

[92] The applicant says that her exclusion from health care is not consistent with principles of fundamental justice because it is arbitrary. The respondent says that the applicant's exclusion from the IFHP is fundamentally just because the program was never intended for illegal migrants who chose to come to Canada and to remain here illegally by choice.

[93] At its core, the purpose of the IFHP is to provide temporary healthcare to legal migrants. Canada also provides IFHP coverage to some illegal migrants, such as victims of trafficking, who are often unwittingly illegal migrants. Canada feels responsible for such illegal migrants because of the fact that they have been exploited by unscrupulous human traffickers. Ms. Toussaint is neither a legal migrant nor is she unwittingly an illegal migrant. Although she entered this country legally, she chose to remain here illegally; there is nothing stopping her from returning to her country of origin. She has chosen her illegal status and, moreover, she has chosen to maintain it. I fail to see how her situation can be said to fall within the purpose of the IFHP. There is a principled reason why a victim of trafficking is entitled to health coverage for medical treatment if needed but other illegal migrants are not. The former is here through deception and manipulation by others; the latter is here by choice.

[94] I do not accept the applicant's submission that her exclusion from health care is not consistent with principles of fundamental justice because it is arbitrary. I see nothing arbitrary in denying financial coverage for health care to persons who have chosen to enter and remain in Canada illegally. To grant such coverage to those persons would make Canada a health-care safe-haven for all who require health care and health care services. There is nothing fundamentally unjust in refusing to create such a situation.

[95] For these reasons this application is dismissed. Considering the issues involved which are in the public interest and beyond merely personal interests to the applicant, and considering the applicant's personal circumstances, it is appropriate that there be no order as to costs.

Refugee (Domestic Violence)

Case: *Park v. Canada (Minister of Citizenship & Immigration)*

Decider: John A. O'Keefe J.

Court: Federal Court

Citation: 2010 FC 1269

Judgment: December 9, 2010

Docket: IMM-1944-10

[56] This Court has held that democracy and legislation alone does not ensure adequate state protection and the Board is required to consider any practical or operational inadequacies of state protection (see *Zaatreh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 211 (CanLII), 2010 FC 211 at paragraph 55; *Jabbour v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 831 (CanLII), 2009 FC 831, 83 Imm.L.R. (3d) 219 at paragraph 42). As Mr. Justice Yves de Montingy held in *Franklyn v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1249 (CanLII), 2005 FC 1249 at paragraph 24:

... the mere fact that the government took steps to eradicate the problem of domestic violence does not mean that the fate of battered women has improved.

[57] The applicant pointed to a significant amount of documentary evidence before the Board which addressed the actual response and conduct of the police in South Korea. This evidence discussed a lack of intervention by police in domestic violence due to the belief that it was a family problem, it noted that police often blame victims and expose them to physical danger, it mentioned the rarity of men being taken into custody or charged with domestic violence, as well as the lack of understanding and awareness in the police of the serious nature of domestic violence. This evidence on the practical reality of state protection in South Korea, which emanated from a variety of sources, was not addressed by the Board. This amounted to a reviewable error.

ImmQuest – Editorial Board

EDITORS-IN-CHIEF

Cecil L. Rotenberg, Q.C.

Certified Specialist

Toronto, Ontario

Tel: (416) 449-8866 Fax: (416) 510-9090

Mario D. Bellissimo, LL.B., C.S.

Certified Specialist

Barrister & Solicitor

Ormston, Bellissimo, Rotenberg

Toronto, Ontario

Tel: (416) 787-6505 Fax: (416) 787-0455

CARSWELL®

**One Corporate Plaza, 2075 Kennedy Road,
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Tel: (416) 609-3800 from Toronto

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E-mail: carswell.orders@thomsonreuters.com

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Content Editor: Suzanne Sixsmith

**Product Development Manager:
Graham Peddie**

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